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Table of Contents

Thirty-Eighth Annual Meeting of the Massachusetts Bar Association

The annual meeting of the Massachusetts Bar Association, duly noticed, in accordance with the by-laws, was called to order at the Hotel Oceanside, Magnolia, Massachusetts, at 2:30 p.m. on Saturday, June 4, 1949. President Wait presided.

Upon motion duly made and seconded, it was

VOTED: That the reading of the minutes of the last annual meeting be waived and that the same be approved as printed and circulated in the Quarterly for October 1948.

The treasurer, Paris Fletcher, summarized his report which had been printed in the Quarterly for April 1949, and

Upon motion duly made and seconded, it was

VOTED: That the Treasurer's report be approved and placed on file.

President Wait then read his annual report as follows:

REPORT OF THE PRESIDENT

I have the honor to present the annual report of the President to the members of the Association.

Executive Committee

The Board of Delegates met on September 24, 1948 and, as provided in the by-laws, selected the following members as the Executive Committee in addition to the President, the Treasurer, the Secretary, and the Assistant Secretary who serve ex officio: James E. Farley, Reuben Hall, Thomas M. A. Higgins, Harold Horvitz, Eleanor March Moody, Frederick M. Myers, and Fredric S. O'Brien.

The practice of holding monthly dinner meetings at the Parker House on Friday evenings was continued. The only innovation in the procedure of the Executive Committee this year was that the minutes of each meeting have been circulated to all members of the committee shortly after the meeting. The Assistant Secretary has kept very full and accurate minutes and it has

been a matter of considerable convenience to the committee members to have these minutes available to them.

Relationship of the Association to Other Bar Groups

Considerable time and thought have been given by the Executive Committee to the possibility of increasing the usefulness of the Association through the possible broadening of the base of membership and cooperation with other associations. A special committee was appointed to study the possibility of common membership in this Association and its affiliated associations and several reports in progress have been considered by the whole Executive Committee. No definite action has as yet been taken. In the same connection there was discussion of the possibility of establishing facilities for the use of the affiliated associations and that matter is also still being canvassed. Steps are being taken to provide for meetings either of the Executive Committee or the Board of Delegates in places other than Boston in the future. It will be recalled that such meetings were contemplated after the last revision of the by-laws, but that the exigencies of the war prevented the plan ever being put into operation.

Considerable thought has been given to the possibility of a mid-winter meeting of the Association to be held in the central or western part of the state. This requires cooperation with the local association in the place at which the meeting is to be held and one of the primary objectives is to make sure that the plans of this Association do not in any way conflict with those of the local association. It is hoped that such a meeting will be arranged next winter.

Continuing Education of the Bar

Closely allied to the over-all question of cooperation with local associations is the matter of continuing education of the Bar and the giving of lectures or institutes at various places in the State. This has been under the most efficient charge of Reuben Hall who has done yeoman's work in this field. There have been correspondence and conferences with the joint committee established by the American Bar Association and the American Law Institute, with Harrison Tweed as President, under the direction of Professor Mulder. An institute was planned to be held in

cooperation with the Berkshire Bar Association, but it had to be postponed because of the illness of one of the speakers and will be held in the fall. A meeting was held under the sponsorship of Mr. Hall's committee in New Bedford which was a complete success.

In addition we cooperated with a group of Boston tax lawyers in sponsoring the New England Tax Institute, which held a highly successful meeting in Boston on May 21.

Legislative Matters

The Executive Committee acted as it has done in the past as the committee on legislation. The number of specific bills concerned was rather less in the past year than it sometimes has been. A special committee has been appointed in connection with the proposed constitutional amendment providing for a graduated income tax, and another special committee was appointed in accordance with the vote of the last annual meeting of the Association to consider the desirability of providing for oral pre-trial discovery procedure in the state courts. The time for the report from the committee on the income tax matter has not arrived and the special committee on discovery procedure recommended further study before the recommendation of any legislation.

The perennial questions of the election of judges and the reorganization of the district courts were considered, and the President appeared before the legislative committees on both of these matters. We opposed the election of judges and recommended that the Legislature take action along the general lines outlined in the pending bills on the district courts without, however, endorsing the specific provisions of the bills.

We likewise urged the Legislature to set up a recess commission to study problems of commitment of insane persons, opposed a bill which would provide for the appointment of assistant registers of probate by registers instead of by the judges and gave consideration to a bill permitting the introduction in evidence of learned treatises as opinion evidence.

A resolution was passed urging further study of the proposed universal Bill of Rights currently before the United Nations. In this connection a regional conference of the American Bar

Association was held in February in Boston at which the matter was thoroughly discussed and which was attended by a number of the members of the Association. I had the honor to preside at that conference.

Finally, a resolution which has been circulated to you all was passed in connection with the legislation pending in Congress in connection with the tidelands litigation. This resolution, with a supporting statement prepared by the Secretary, was circulated among all members of Congress and received an extraordinary measure of laudatory comment. It is hoped that we succeeded in furthering the interests of the Commonwealth in this matter, the importance of which had not been wholly appreciated.

Commission to Revise the General Laws

Early in the year a special committee was appointed to cooperate with the commission charged with the duty of revising the General Laws. The important situation with reference to that commission, however, arose in the spring when the appropriation for the commission was eliminated from the state budget. At the request of the members of the commission the Executive Committee considered the matter and passed a resolution urging restoration of the appropriation. Letters were written to all members of the committee of the Legislature which had the matter under consideration and to numerous other persons in prominence in the Legislature. The President also conferred with various members of the Legislature. Mr. Hall attended the only hearing held on the matter and presented most forcefully the position which we had taken. Our efforts to date have been completely unsuccessful. We received repeated assurances of assistance, but the appropriation was not restored and the budget was signed without it. There will probably be a further supplementary budget presented and there is a possibility, but no great probability, that the matter will be taken care of in that. This is a matter which should be brought to the attention of all members of the Bar and which I suggest merits the expressed disapproval of the Bar.

Proposed Rules Governing Appellate Procedure

In his report last year the President referred to the committee appointed to work jointly with the committee of the Boston

Bar Association in connection with the drafting of rules governing appellate procedure. Drafts of rules have been submitted to the court. The desirability of the adoption of these rules is to be considered later at this meeting, so I include no discussion of the rules in this report.

Massachusetts Law Quarterly

The Quarterly continues in a healthy condition. I am gratified to be able to report that Professor Cancian, with the help of some of his students at Northeastern University, has undertaken to compile a complete index. This undertaking, when complete, will, it is believed, be of considerable benefit to the Bar. The only new feature in connection with the Quarterly is the inclusion of advertising pursuant to the authorization voted at the last annual meeting of the Association. Some $900 was received as the result of arrangements for advertising in the current volume of the Quarterly.

The Land Court Dinner

The outstanding social event of the year was a dinner given jointly by the Association and by the Massachusetts Conveyancers' Association in honor of the Land Court. The cost of the dinner was underwritten by the two associations. It cost us only $169.45, and the affair was, I think, a complete success. We are very happy to have been able to offer this testimony of the esteem in which we hold the Land Court.

The Quarters of the Association

The possibility of moving the rooms of the Association from 53 State Street to the Boston City Club was canvassed by the committee. The City Club had suggested our taking rooms as a part of a general endeavor on its part to make its building something in the nature of a civic center. The chief advantage to the Association of any such move would be the possibility of obtaining accommodations for the night and other club facilities for members from out of town who had occasion to be in Boston. On the other hand, the rooms offered did not seem nearly as attractive as those which we now have, and the Executive Committee took no action looking toward such a move.

Grievances

During the period from June 3, 1948 to June 3, 1949, there were sixty-eight formal complaints filed with the Grievance Committee. Twenty-one were referred to other bar associations, principally the Boston Bar and the Middlesex Bar Association; seventeen complaints were considered and dismissed without extensive investigation as the preliminary investigation showed that the complaint did not warrant further action; nine cases were investigated at length and dismissed either on the ground that no unethical conduct was involved or because there was restitution or satisfactory adjustment made and no further disciplinary action was considered necessary; twelve complaints were withdrawn and did not appear to require further action. There are now pending and under investigation seven complaints.

Two of the pending complaints are of a serious nature and are now being investigated by the Chairman.

There have been numerous informal inquiries as to grievance matters which came to the attention of Mrs. MacLeod, but which have not resulted in the filing of any formal complaint.

The major portion of the time of the Executive Committee was, as heretofore, given to consideration of matters pertaining to the Institute here at Magnolia. As to that I leave the decision as to whether we acted wisely in your hands. You are concerned with what we have provided, not with how we set about doing it.

This report does not profess to cover every matter considered by the Executive Committee. It has been a source of some surprise to me to discover how large a correspondence file I have accumulated in the course of the year. Nothing that I have done as President has been of very great moment, and in the matter of the revision of the General Laws I must confess a failure. It has, however, been a source of gratification to work with the members of the Executive Committee and the other officers.

One resolve of the Executive Committee should be incorporated verbatim in this report and consequently in the minutes of this meeting. That resolve was passed at the meeting of the committee held January 21, 1949 and it reads,

> "That this committee extends its congratulations to Mrs. Eleanor March Moody upon her selection as one of

the ten outstanding women in New England and that this resolve be recorded in the minutes of the meeting."

The committee and the Association bask in the reflection of Mrs. Moody's glory.

Respectfully submitted,

RICHARD WAIT

George L. Wainwright of Brockton, Chairman of the Nominating Committee, gave its report containing nominations as printed in the "Quarterly" for April 1949 (pp. 4 and 5) and sent to all members in advance of the meeting as provided in the by-laws. The secretary then announced that he had received no additional nominations in writing. A ballot being taken the nominees were declared duly elected to their respective offices.

The President then presented to the meeting for discussion the question of the Proposed Revised Rules for Appellate Procedure. He outlined the history of the work of the committee and the principal basic changes proposed. He reported that the post-card return ballot to date showed 113 in favor of the rules without comment; 50 favoring the rules with some comment; 3 expressing no opinion, and 8 voting in opposition. He also reported the receipt of numerous letters containing helpful comments. He further pointed out that as a result of discussion and consideration since the transmission of the proposed rules to the Supreme Judicial Court and their publication to members of the bar, it had become apparent that a change in the method of computing the time for filing briefs was desirable and that the committee would probably recommend that the time be computed from the date of hearing backward rather than forward from the date of entry. Mr. George Black urged the desirability of a change which would permit the printing of the record by the parties rather than by the Clerk. Mr. Samuel Sears spoke in opposition to such a change.

Mr. Edward Proctor voiced his approval of the change contemplated by the rules whereby the appellant's brief would be filed first and a reply brief would be filed thereafter by the appellee. Mr. Benjamin Goldman discussed at some length the question of the printing of the record and urged that the parties

rather than the clerk should be permitted to attend to the printing. He suggested that the appellant be given the right to designate a printer to whom the record is to be sent for printing and expressed the belief that this could be done without amendment of the statute if the printing were done by the Clerk of the Supreme Judicial Court.

Mr. Talcott Banks, Jr., speaking for the committee, pointed out that such a change would require statutory amendment which the committee had sought to avoid at the present time although he stated that it was the belief of some members of the committee that such a statutory reform was desirable. He noted that the statute requires the printing to be done by the clerk of the lower court and pointed out that while revision of Gen. Laws, Chap. 231, s. 135, is needed for many reasons, the proposal of such statutory changes was not felt to be within the province of the Rules Committee.

Mr. James M. Rosenthal of Pittsfield inquired as to the present number of members of the Association and Mr. Fletcher, the Treasurer, replied that the present membership stands at 2,563. Mr. Rosenthal suggested that the Chief Justice of the Superior Court be requested to instruct the judges of that court to excuse lawyers engaged in trial before them during the time the Institute was being held each year so that they may attend the Institute. The President replied that this matter had already been brought before him and that he will make such a request prior to the next annual Institute.

Mr. Rosenthal also proposed for consideration the question whether the Association could not render services through its Boston office for members residing in distant counties having business to be transacted in Boston. The President replied that this matter is already under consideration by the Executive Committee and that it will be given further study. The suggestion was also made by Mr. Rosenthal that the members would be very appreciative of any effort which could be made to see that the Quarterly is brought out at regular quarterly intervals during the year and distributed on definite dates fixed and announced in advance.

Mr. Kenneth Bond moved a rising vote of thanks to the

committee on the Revision of Rules for Appellate Procedure and the motion was adopted by a rising vote.

Mr. George Black made the suggestion that the Association publish a directory of Massachusetts lawyers.

The meeting was adjourned at 3:45 p.m.

A true record.

Attest. WILLIAM B. SLEIGH, JR.,
Assistant Secretary

The Eighth Annual Massachusetts Lawyers' Institute

A large number of lawyers and their wives or husbands from more than thirty cities and towns all over the commonwealth attended the Institute at the Oceanside Hotel in Magnolia on Friday and Saturday, June 3 and 4. The afternoon of Friday was devoted to descriptions and discussions of state administrative law and procedure by Robert M. Segal, Esq., Mrs. Emma S. Tousant, a member of the Industrial Accident Board, and Prof. Albert R. Beisel, Jr. of the Boston University Law School. Reuben Hall, Esquire, presided. Some of the suggestions made will be discussed in the next issue of the "Quarterly".

In the evening Harold L. Levin, Esquire, of the Boston bar, who is also an amateur magician, entertained the gathering most successfully.

On Saturday there was a discussion as to the extent of congestion of dockets and as to the need of new experiments in dealing with tort cases. Samuel P. Sears, Esq., presided and opened the discussion describing a plan about to be tried out in New York. He was followed by Joseph B. Abrams, Esquire, of the Boston bar and others. Some of these suggestions will also be discussed in the next issue of the "Quarterly".

Following the annual meeting of the Massachusetts Bar Association in the afternoon, the meeting of the City Solicitors and Town Counsel Association was addressed by Dr. John F. Conlin of Boston on the subject of "Socialized Medicine".

At the Institute dinner in the evening, at which President Wait presided, the speakers were Senator Flanders of Vermont, who discussed national aspects of Big Business and Big Government, and Chief Justice Qua, who discussed some aspects of the suggested rules as to appeals circulated to the bar for criticism in the "Quarterly" and in the "Bar Bulletin".

The Argument of an Appeal

By

Hon. Raymond S. Wilkins, Associate Justice of the Supreme Judicial Court of Massachusetts

Editorial Note

How to argue an appeal, whether orally or on paper, is an ever present problem with the bar. An argument, like conversation, involves more than one person—somebody to talk and somebody to listen. In the English courts of appeal, in which each judge ordinarily announces his opinions orally at the close of the arguments, it is often a running conversation across the bench accompanied occasionally by examination of books by the judges during the conversation as a basis for questions or comment. Here opinions are reserved for later announcement in written opinions. In either case, and especially in American courts, the problem of the bar is an attempt to pierce what the Chief Justice described a year or two ago at the Middlesex Bar dinner as the "invisible curtain" between the bench and bar. It always helps, therefore, to know how a judge listens and works because it helps the bar to help the court. That is the purpose of argument. There is no mystery about judges. As Mr. Justice Wilkins reminds us, judges are nothing but people and they want to be helped and not bored if possible and it is in the interest of clients that they should be. That calls for some imagination. The picture, in the following paper, of the judge working, some time after the argument, as a "lonely thinker" in preparing an opinion, is not mere rhetoric. It describes the working process in the artistic spirit which is the same in law as it is in music or painting or science or what not. This does not mean "one man" decisions. It means that a member of the court has to convince his colleagues (who are not "yes" men) before the court tries to convince, or state the law for, a bar whose function is critical thinking.

If this paper is read in connection with the remarks of Chief Justice Qua which we printed in the "Quarterly" for October 1948 reflecting the deep consciousness of the court of their heavy responsibilities and their natural desire for help, we believe it

will help the bar to help the court and that is the job of the bar in argument.

The paper was distributed to many of the bar not long ago by Mr. Getchell in one of his helpful leaflets. We believe our readers will like to have it available in more permanent form for reference.

F.W.G.

MR. JUSTICE WILKINS' PAPER

(A lecture delivered at the Cornell Law School under the Frank Irvine Lectureship of the Phi Delta Phi Foundation. Copyright by Cornell University. Reprinted from the Cornell Law Quarterly by permission of the editor and of Mr. Justice Wilkins.)

The argument of an appeal is, in most cases, the last, and frequently the most important step in the trial of a lawsuit. In the appellate court, a case which up to that point has been lost, may still be won. On the other hand, a case which has been carried thus far with success may nevertheless be lost. Anyone can cite numerous examples from the myriads of decisions which are authority for this truism. If it be thought that, occasionally at least, some cases have been wrongly decided, and that still other cases may yet be, this should be a further incentive to appellate counsel to assist the court. And in these days when divided courts may be more common the challenge to appellate counsel is even greater.

Upon this very old subject I have no delusion that I may present any new thought. Nor do I have any notion that I might fall within the rule of property once laid down in verse by James Russell Lowell:

> "Though old the thought and oft exprest,
> 'Tis his at last who says it best."

What I hope to say, although admittedly not new, has—to speak conservatively—been demonstrated so thoroughly to have eluded general mastery and to have failed to receive uniform application that repetition is not only justified now but undoubtedly will be throughout the predictable future.

At the outset it should be appreciated that a great change has occurred in appellate practice in the last one hundred years.

In the early years of the Supreme Court of the United States the oral arguments consumed hours and, in some cases, days. This could only have been with the approval and encouragement of the judges, who must have felt that this assisted them. As time progressed, changed conditions vastly increased the case load of the courts, and there is now a marked tendency to the other extreme of restricting greatly the time permitted for oral argument. Judges think that this method will best assist them in their work as a whole. No disapproval of the principle of oral argument is involved. It means merely that in these days less rather than more talking on both sides fits in better with the scheme of things judicial.

Let us begin with a few words about the record, which is, or should be, the tangible reproduction of the case. In my state the printing of the record is in the hands of the clerk. What it should contain is settled by statute, by rule of court, and by decision. It is most prudent, however, to confer with the clerk to make sure that the record contains everything that one is entitled to have included, and, what is equally important, that it is not cluttered with anything which there is a right to have omitted and which neither counsel intends to use. Those moments are most wearisome which are devoted to arguments and discussions arising out of belated discoveries of avoidable shortcomings of the record.

Once the record is printed and received, counsel must adhere to the fundamental rule which permeates the whole subject of appeals: Know the record! Its substance must be mastered in order to prepare the brief, and, for the most effective oral argument, this mastery must be retained and alertly supplemented by a geographical familiarity—that is, by page and line—with its every nook and cranny as perfect as was the knowledge of Nydia of the smoke and cinder filled streets of Pompeii. Failure to know and to understand a record sometimes results in the argument of a different case than is in fact or in law before the court.

Once a case has reached the appellate court the procedure, I suppose, does not differ much throughout the country. Essentially it is this. Upon the basis of a printed record there must be prepared a printed or written brief, the length of which usually is not, but nevertheless may be, limited by rule. This may be,

and usually is, followed by an oral argument, the length of which is rigorously limited by rule. This means that one should make the best use of each of his two weapons, the written and oral argument. The argument in the brief may be extensive, but the oral argument must be intensive.

The brief should be drawn with an eye toward creating a favorable first impression in the judge's mind. It should be able to weather oral assault by an opponent, who will surely have read it before the arguments. It should contain everything which is worth arguing in the case, and should cover with finailty questions like those of evidence, which can at most merely be adverted to orally. On the other hand, whatever, upon mature deliberation, is considered unworthy of argument should be frankly and expressly waived. This was Abraham Lincoln's method, and it was a good one. It is a practical recognition of the rightness of Cardozo when he wrote, "Analysis is useless if it destroys what it is intended to explain."

The preparation of the brief should proceed in the knowledge that it is timeless and tireless in its ability to speak. Owing to the case load of each judge and the number of working days in the year there is no secret in the disclosure that an opinion may take form under tremendous pressure. It is also true—at least it is with me—that at some moment in the consideration of a great many cases the scent suddenly becomes very hot. The physical processes—the hand if you write, or the tongue if you dictate—struggle to keep pace with the mental. The excitement may be genuinely great. I recall a cartoon in a leading periodical of a hunter riding alone who without warning came upon three foxes. His ejaculation, "Tallyho for goodness' sake", becomes the apogee of understatement in comparison with the judicial sensations at the moment to which I refer. The brief maker should take all this into account. On that indefinite future day, perhaps weeks after the arguments, when the writer of the opinion, in the solitude of his lonely room, starts work on the case, the brief with all its merits and all its shortcomings is there before him to read if he will. And he most certainly will read it on the issues material to the line of reasoning of the projected opinion. In fact, he may re-read it a score of times, particularly if

it be the brief of the side which at the moment appears to have the worse of the argument on the point under consideration.

In aiding this cloistered workman, the advocate should realize that he is aiding his own cause. Hence, he should make sure that his brief is appropriate, and neither too long nor too short for the particular case. The facts must be fittingly set forth with supporting references to the record which are accurate and explicit. Nothing will forfeit the confidence of the court more effectively than the misstatment of the record or the statement of a fact off the record. The latter failing is especially pernicious, as it sends the writer of the opinion on a wild-goose chase hardly calculated to enhance his estimate of the soundness of the legal principles of him who brought it about.

The statement of facts should be succinct but at the same time full and complete as to the material issues. Such a statement is not easy to prepare, but it probably is the most important single thing appeal counsel has to do. Facts tend to complexity and often are double-edged blades. Two great figures, one in English, and one in American, literature, were both right, when they respectively said many years apart, "Facts are stubborn things," and "Facts are contrary 'z mules."

If a statute, city ordinance, town by-law, or rule of some court or administrative body is involved, it should be quoted accurately and in full. The places in the record where the questions of law arose should be meticulously cited. The newspaper headline format is out of place and constitutes self-confessed ineffectiveness of expression. The brief should be logically arranged by topic with reasonable citation of authorities, so that, when the three foxes sooner or later appear, the judicial huntsman will not lose too much time in hurdling any hedges in the reasoning, or be led off the scent through citations which may not be in point or which may be unreasonably numerous or incorrectly given. The citations should be selective and support the respective propositions of law. Citations are not merely conventional, like marks of punctuation, nor are they like architectural embellishments added for no utilitarian purposes but solely for adornment. The suggested purpose will not be attained by listing the first cases remotely in point which are discovered, much less by transcribing on faith directly to the brief an uncensored galaxy of citations clustered in the footnotes of

some digest or other stock of prefabricated material. The members of a court need no indiscriminate ticket of admission to the library stacks. If no case in point be found, it is better to cite none, and to emulate the frankness of the English counsel, immortalized in one of the case books I used in law school, who, when asked by the court what authority he had for his statement, responded, "None, my Lord, but I submit that it must be true on principle." If your brief is long, and you have cited a large number of cases, an index is desirable, even though the rules of the particular appellate court may not require it. When you cite the Federal Reporter, give the name of the court in parenthesis. It may be important to indicate whether it is a decision of the Court of Appeals of the Second Circuit or of a District Court judge deciding a case in the first instance. Don't cite the arguments of counsel, which are sometimes printed in the law reports, unless, on rare occasion, you mean to do so and refer to them as such. Don't cite cases which have been overruled unless, on rare occasion, you mean to do so and refer to them as such. Mr. Shepard will help you here. If you quote from a decision in another case, quote it absolutely accurately. Should you omit from the quotation parts of that decision which you deem immaterial, carefully indicate any omissions. Above all, take care not only to avoid garbling the quotation but to avoid the least appearance of doing so. Do not use those disconsolate inadequacies, *supra* and *infra*. They border on the discourteous unless the point referred to is but a few lines away, and in that event they are not needed.

I shall leave this topic by saying that I do not believe that the brief can be proofread too often or too carefully. It should be checked with the record and with the original law reports, not with your own draft. Such reading crystallizes knowledge of the issues. It is the best preparation for the oral argument. And it should utterly eliminate typographical errors. One or two undetected misprints may be excusable in these days of postwar printing, but any considerable number tends to destroy confidence in the substance of the brief itself and in the conscientious thoroughness of its preparation.

The other weapon of contending counsel on appeal, the oral argument, affords a great opportunity. It is a mild euphemism to aver that this opportunity is sometimes not fully realized.

Appellate argument resembles general literature. Almost anyone has some critical competence, but only the few achieve a standard of performance which the many sense. Although appellate argument is a common occurrence and represents the culminating competive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole. This continues true notwithstanding that there have been delivered highly distinguished exhortations on the subject, many of which have been published and are easily available.

A bench of appellate judges is commonly composed of just so many ordinary men. If it is not, there is something wrong, something non-human, about that particular bench. That the bench and the bar are sprung from a common fungible source is illustrated by the statement of a distinguished Pennsylvania lawyer who declined appointment to the bench because, as he has been quoted as saying, he would rather talk to fools than listen to them. Counsel should never forget this identity of origin, and in their arguments should try to enlist the sympathetic interest of their fellow humans, the judges. This calls for a supreme effort to make the presentation as attractive as possible, both in substance and in form. The vital point or points should be exposed and attacked incisively. This calls for careful deliberation in advance. The manner of speaking should be varied to attain the proper degree of impressiveness. A monotonous intonation should be avoided. In this connection it is constructive to think of the baseball pitcher who has a good change of pace.

I have already said that the oral argument must be intensive, and it has to be, in order to achieve, within the limited time, effective fire power upon the fleeting target. Counsel wants the court to understand the case, and, at the same time, to understand it his way. The right method of doing this is simple: Tell the judges about it. Give them the facts, and begin by giving them the facts. The very first sentence should focus attention upon the general nature of the controversy. It should settle, once and for all, whether the subject at hand is a murder, a taking by eminent domain, a divorce, or the application in a will of the rule against perpetuities. No matter how interesting —to counsel—the points of law may be, they should be merely indicated and not argued until the essential facts have been stated, even if this requires reliance upon the brief for much of the

law. This means that there should be a budgeting of the allotted time and, except in emergency, a rigid adherence to it.

To the court every new record is a mystery. Sometimes it is also a labyrinth. Whatever their legal qualifications judges usually are neophytes as to the facts of a particular case. In my experience it is seldom that there has been an opportunity before the arguments to study the records or the briefs. Even on rare occasion when a judge is able to do this, he does not acquire from the cold record the grasp of detail and the perspective of facts which counsel always should, and usually do, possess. In my earlier days, while traveling in Europe, before striking a new town, I always studied a street plan, so that I might later find my way about without contemporaneous consultation of a guidebook. By analogy, the oral argument could be the introduction and guide to the record and briefs. It is advisable if possible, during the argument, to induce the judges to make on their copies of the record and of the briefs, as many pencil marks as may be reasonable to indicate facts or authorities favorable to the contentions. Counsel should give them his view of the mystery, and if there be a labyrinth, he should guide them his way to the place where the Minotaur is to be found. Likewise, if there are important plans, photographs, or documents, not printed in the record but incorporated by reference, this information should be called to the attention of the court early in the argument. What a futile sensation it is when a somewhat blind argument makes this revelation almost by way of peroration!

If, notwithstanding every conscientious act of thoroughness, errors have been discovered in the record or in your own brief, bring them to the court's attention by page and line early and before the argument really gets under way, but preferably not as the topic sentence. If you find similar errors in your opponent's brief, tell him privately, so that he may correct them on his time and not on yours.

A statement of facts should contain the facts, all the facts, and nothing but the facts. Statements off the record are just as bad in the oral argument as in the brief. The inevitable dénouement may or may not be close at hand, but its effect, whenever it occurs, will be equally baleful. Equally devastating is the suppression of a vital fact. In a certain case of the Sherlock Holmes type, the defendant's counsel argued his full time without men-

tioning anything remotely connecting his client with the crime. The presentation differed from Poe's truncated *Murders in the Rue Morgue* only in not being admittedly fragmentary. The prosecuting attorney in a few moments then supplied the omissions which rendered the whole evidence as cogent as that which satisfied Robinson Crusoe that he was not alone on the desert island. A delay of one hour in the full exposure of the facts is hardly worth while. To entertain an expectation that such exposure may not occur is sheer chauvinism. There was a wise saying in the Field Service Regulations of the United States Army which went something like this, "Always attribute to the enemy the same intelligence as your own even though he may not possess it." This is equally applicable to an argument on appeal. I believe it must have been this sort of thing which Thomas More had in mind when he wrote in his *Utopia*, "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters."

An inevitable and valuable part of the arguments is the questions by the court. Although often so regarded, they usually are not a manifestation of unfriendliness. Nevertheless, a question may be. There is the instance in that delightful book, "Philadelphia Lawyer," where the judge's question was met by the response, "Your Honor, I am addressing myself exclusively to those members of the court who do not make up their minds until the conclusion of the argument." Of course, no advantage lies in feeling, much less in betraying, annoyance. There is the occasion of the counsel who had closed his argument without damage from his own efforts or those of his opponent only thoroughly to be discomfited at the last moment by an interrogation from the bench. He then turned to the spectators and inquired, "Is there anyone else present who would like to ask any questions?"

Questions by the court most often spring from a yearning for the facts. They sometimes are means of communication to a colleague on a distant part of the bench, perhaps in reply to a question of his to counsel. In the main, they serve to advise the advocate of the issues to which at least one judge is directing his attention, and as such are a coöperative effort to make the best use of time, and thus expedite a just determination of the cause.

It often happens that a question is asked which relates to a matter which counsel intends to consider at a later point in his argument. The best way to handle the situation is for counsel to state briefly what the answer is to be and say that he will cover the matter more fully before he closes. But should he follow this course, or should he feel that to give an answer on the spot would require too long a digression and that he wishes to be excused temporarily from answering, under no circumstances should he omit to carry out his promise. To fail in this respect evokes judicial speculation as to the reason. Was it an oversight? Was it ignorance? Was it evasiveness? Or was it something else? And if so, what was it, and what is its bearing upon the merits of the case?

One situation which occasionally arises in questions from the bench is beyond the control of counsel. It may be that a judge may put a formidable question before counsel scarcely has begun to speak or to have had a fair opportunity to state his position. In that unfortunate plight the most that counsel can do is respectfully and tolerantly make the best answer he can, and trust to good fortune that he will be able to resume stride without losing too much precious time.

Like every speaker on this subject, I have a few favorite "Don'ts". The brief reader may be dismissed with an anecdote. Wearied by the futile consumption of time by a lawyer who was droning through his brief, a helpless judge wrote on a piece of paper, "A brief reader is the lowest form of living animal," and then passed it to a colleague. The latter read it, took a pencil, wrote, "He is a vegetable," and passed it back.

A brother of the half-blood to the brief reader is the counsel who instead reads a prepared statement. The only difference to be observed is that it is harder to guess the probable length of the ordeal when, unlike the brief, there is no copy in one's own hands. Regardless of what is read, the very act of reading draws an iron curtain between counsel and the sympathetic attention of the court.

Do not relate the facts of cited cases in painful detail. They are too many to be absorbed from oral presentation. It wastes time that can be utilized to better advantage. In the average case it is sufficient to announce that you rely on such and such cases. The court, before deciding the case, will read them just as care-

fully as have counsel if they are even remotely material to the reasoning of the opinion.

One should never volunteer the statement that he did not try the case below. It is at most a defensive remark, and is too suggestive of "*Sauve qui peut*".

If extra time is allowed for the argument, this should not be regarded as an offer by the court to a unilateral contract to be accepted only by a speaking performance which persists till the last grain of sand has run out of the hourglass. The words that remain unspoken under such conditions beget much good will, particularly with the attending members of the bar awaiting their turn to address the court. This principle applies to all arguments. In an earlier court generation one youthful counsel, who asked how much time he was permitted, was told, "You have half an hour to talk, but you do not have to talk half an hour."

It is just as important to close as it is to open. The argument should not be a one-way ticket to nowhere. Upon reaching the predetermined destination, one should alight. In other words, he should make clear his final point, stop talking, and be seated. And in so doing expressions of gratitude or thanks to the court for their attention are most unhappy. Such a rhetorical anti-climax is, at best, none too pleasing to the judicial ear. Some years ago such a conclusion more than once evoked a judicial reminder that listening was the very minimum of the duties of the office to the faithful performance of which all the members had been duly sworn.

There is sometimes the problem whether to argue orally or to submit on briefs. If the record is complicated, my advice is not to lose a golden opportunity to set forth the facts in the presence of those who must understand them before they can decide the case. If the record is not complicated, and if you prevailed in the court below, and if your opponent is going to submit, it may be wise to rely on your brief provided you are still satisfied with it. But if you were unsuccessful below, or if you were successful and your opponent is going to argue orally, it is my belief that allegiance to the cause calls for oral argument on your part. General rules without exception applicable to every case can not be laid down, and what I say is only the view of one judge of one court, and not the result of any Gallup poll.

One may wonder how it is possible, in a half hour or in an hour, to make an oral argument upon appeal and yet do justice to a case which may have taken days, or even weeks, to try in the lower court. One answer is that the judges have a profound familiarity with the law of their own jurisdiction. They are also experienced listeners, and are alert to detect wherein the argued case resembles decided cases. With a skillful oral statement of the salient facts and with the brief to rely upon, it is seldom necessary to do more than guide their minds from the cornerstone of fact to the structural outline of the legal principles believed applicable. It is not uncommon that when a case is called for argument, counsel in tones approaching despair proclaim their inability to argue within the prescribed time limit and beg for an extension. It is my observation that, aside from capital cases, counsel, more often than not, fail to give the court assistance commensurate with any additional time allotted.

In my early days of practice, I asked a leader of my local bar what he considered the best method of learning to try a case. He responded, "Try and try and try, and get licked over and over again." I do not think it is indispensable to taste exclusively of the cup of defeat in order to acquire proficiency in appellate argument. But experience is the only guide, and that means an experience based upon a planned course designed to avoid mistakes, and, after mistakes inevitably occur, to avoid their repetition. In this, as in other fields of the legal profession, the successful practitioners are not men—if there be such—who never made a mistake, but are men who undismayed do not repeat them.

I believe I have demonstrated how difficult it is to disclose any really new aspect of this very old human relationship, the argument of appeals. It is fortunate perhaps that discoveries in this field are unlikely, because the old has proved more than adequate to test the mettle of both judge and advocate. In the great *nisi prius* case of *Shylock* v. *Antonio*, the plaintiff asked one question which at the time did, and usually would, provide its own answer, "Wouldst thou have a serpent sting thee twice?" As an aspect of the argument of appeals there may be more than one view as to the proper answer to that question. At all events, I trust that I may be accorded pardon for any superfluous sting.

[Chap. 171]

An Act relative to the further report of material facts in equity and probate appeals where the evidence is not reported.

Section 1. Chapter 231 of the General Laws is hereby amended by inserting after section 125 the following section:—*Section 125A.* Upon appeal in any case, in equity or probate, where the evidence is not reported, the full court, if of opinion that a report of material facts required by or made under section twenty-three of chapter two hundred and fourteen, or section eleven of chapter two hundred and fifteen is not sufficient to enable the court properly to adjudicate the subject matter involved, may in its discretion, by order transmitted to the trial court, direct the justice, or judge, to make such further report of facts as the full court shall deem necessary. Upon compliance with such direction, seven typewritten copies of such further report shall be filed by the clerk or register with the clerk of the supreme judicial court for the commonwealth for the use of the full court.

Section 2. This act shall take effect upon its passage.

Approved April 12, 1949.

Note

This follows the recommendation in the 24th report of the Judicial Council to carry out a suggestion of the Chief Justice. See report pp. 17-19 (reprinted in M.L.Q. for December 1948).

[Chap. 183]

An Act making admissible in evidence in cases of contract or tort for malpractice certain statements of fact or opinion contained in published treatises, periodicals, books and pamphlets.

Section 1. Chapter 233 of the General Laws is hereby amended by inserting after section 79B, inserted by section 1 of chapter 385 of the acts of 1947, the following section:—*Section 79C.* A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitaria,

as evidence tending to prove said fact or as opinion evidence; provided, however, that the party intending to offer as evidence any such statement shall, not less than three days before the trial of the action, give the adverse party notice of such intention, stating the name of the writer of the statement and the title of the treatise, periodical, book or pamphlet in which it is contained.

Section 2. This act shall take effect on September first in the current year. *Approved April 18, 1949.*

Note

For the background of this new exception to the hearsay rule see Wigmore on Evidence, 1940 ed. Vol. VI, ss 1690-1700 pp. 1-21 where cases are collected; and Model Code of Evidence Rule 529.

[Chap. 140]

An Act to permit the apportionment between principal and income of the expenses, costs and counsel fees of certain fiduciaries.

Chapter 206 of the General Laws is hereby amended by striking out section 16, as amended by chapter 36 of the acts of 1941, and inserting in place thereof the following section:—*Section 16.* An executor, administrator, guardian, conservator or trustee shall be allowed his reasonable expenses, *costs and counsel fees* incurred in the execution of his trust, and shall have such compensation for services as the court may allow. Such compensation, *expenses, costs and counsel fees* may be apportioned between principal and income as the court may determine.

Approved April 4, 1949.

Note

The act of 1941 provided for apportionment of "compensation" of the fiduciary. This new statute extends apportionment as indicated in italics.

The recent opinion in *Old Colony Trust Co.* v. *Townsend*, 1949 Adv. Sheets pp. 589-594 applies the act of 1941 to a trust antedating the statute and states (p. 591) that "where the facts in a particular case call for an apportionment, then it should be made unless the trust instrument manifests a clear and definite intent that the charge for compensation shall not be distributed between principal and income."

Presumably the opinion applies also to the new act of 1949, but the whole opinion should be carefully read in connection with both acts.

[Chap. 176 — Damages in Mandamus]

This act amends Gen. Laws Chap. 249, s. 5 as amended by St. 1943 Chap. 274 s. 2 by providing that a petitioner in mandamus may recover back "salary or wages" without bringing a separate action. See 24th report of the Judicial Council p. 26.

[Chap. 179 — Late Demands for Proof]

An Act providing for the allowance of further time for filing a special demand for proof of fiduciary or corporate capacity or of the existence of a public way in civil actions.

Section 30 of chapter 231 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the word "allegation", in line 6, the words:—, or within such further time as the court may allow on motion and notice,—so as to read as follows:—*Section 30.* If it is alleged in any civil action or proceeding that a party is an executor, administrator, guardian, trustee, assignee, conservator or receiver or is a corporation, or that a place is a public way, such allegation shall be taken as admitted unless the party controverting it files in court, within the time allowed for the answer thereto, or within ten days after the filing of the paper containing such allegation, or within such further time as the court may allow on motion and notice, a special demand for its proof. *Approved April 13, 1949.*

Note

See 24th report of the Judicial Council pp. 27-28.

[Chap. 184]

An Act relative to arrests without a warrant for larceny.

Section 28 of chapter 276 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the word "process", in line 1, the words:—may arrest without the issuance of a warrant and detain a person found by him in the act of stealing property in his presence regardless of the value of the property stolen, and,—so as to read as follows:—*Section 28.* Any officer authorized to serve criminal process *may arrest without the issuance of a warrant and detain a person found by him in*

the act of stealing property in his presence regardless of the value of the property stolen, and may arrest and detain a person charged with a misdemeanor, without having a warrant for such arrest and detention, if the officer making such arrest and detention shall have actual knowledge that a warrant then in full force and effect for the arrest of such person has in fact issued.

Approved April 18, 1949.

Note

See 24th report of the Judicial Council pp. 33-36.

Removal of Cases to the Federal Court

In the "Quarterly" for October 1948 (p. 43) we warned those having to do with removals to study the *revised* United States Code on the subject which changed the earlier practice and made it necessary to remove a case in Massachusetts and in some other states before the case was entered, without knowing whether the case ever would be entered and before receiving or having an opportunity to examine the declaration, because the new time for removal proceedings did not fit the local practice as to service and filing declarations. This matter was called to the attention of the A.B.A. House of Delegates by members of the Massachusetts delegation, through a committee report and the House supported a proposal to correct the difficulty. On May 24, 1949 a bill (H.R. 3762) was approved containing fifty-five pages of amendments to the federal Code. This bill is now Public Law 72 of the 81st Congress.

The new provisions now in effect as to the removal of cases are as follows:

"Sec. 83. (a) Subsection (b) of section 1446 of title 28, United States Code, title 28, United States Code, is amended to read as follows:

"(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

"(b) Subsection (e) of such section 1446 is amended to read as follows:

"(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded."

[Chap. 56]

An Act relative to the publication of process in probate proceedings.

Section 3 of chapter 215 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end the following sentence:—Whenever service of any notice, citation, order or other process in any of the foregoing proceedings is ordered to be made by publication the names of the estates or parties to such proceedings shall be printed in bold type.

Approved March 8, 1949.

Note

This rather vague statute seems clearly directory and does not make "bold type" a condition of the legal validity of the notice. Most of the newspapers are doubtless aware of the statute and follow it as far as practicable, but we have received a letter from a paper outside of the Metropolitan district suggesting that we call it to the attention of the bar. In order to understand its vagueness and directory nature the whole section, as amended, must be read.

"SECTION 3. Probate courts shall have jurisdiction of probate of wills, of granting administration on the estates of persons who at the time of their decease were inhabitants of or residents in their respective counties and of persons who die out of the commonwealth leaving estate to be administered within their respective counties; of the appointment of guardians and con-

servators; of all matters relative to the estates of such deceased persons and wards; of petitions for the adoption of children, and for change of names; of libels for divorce or for affirming or annulling marriage brought in the probate court; and of such other matters as have been or may be placed within their jurisdiction. Whenever service of any notice, citation, order or other process in any of the foregoing proceedings is ordered to be made by publication the names of the estates as parties to such proceedings shall be printed in bold type."

In the case of the estate of a deceased person and some other matters listed the "name" to be in "bold type" is clear. In other cases it may not be so clear. The notice to be published is ordered by the court generally in a form required by rule of court approved by the Supreme Judicial Court under section 30 of chapter 215. The act does not purport to affect the validity of a notice published as ordered by the court. It is too vague for that.

If anyone is apprehensive about the possibility that the word "shall" in the statute has such a mandatory meaning as to affect validity of a notice we call attention to the late Mr. Israelite's article on "shades of 'Shall' " in 30 M.L.Q., No. 2, October 1945, pp. 42-48. He discussed one section of a statute in which the word "shall" was used about half a dozen times, with different meanings, and the fact that *Boston* v. *Cable*, 306 Mass. 124 in 1940 holding one "shall" mandatory, was overruled three years later by *Boston* v. *Barry* (315 Mass. 572, 578) holding it directory. While Chapter 56 might well have been phrased somewhat differently it contains no suggestion whatever of any mandatory intention to affect the validity of a notice or the jurisdiction of a court by the use of the word "shall".

F.W.G.

A Warning to the Bar as to District Court Appeals

Two Recent Decisions

On March 8, 1949, the case of *Famigletti* v. *Neviackas*, (1949 Adv. Sheets 315) was decided. This was an appeal from the Appellate Division of a district court. Famigletti sued for a deposit. Neviackas claimed a commission, in setoff. The district court found for the plaintiff and against the setoff. Neviackas claimed a report to the Appellate Division.

> "On May 14, 1948, Neviackas mailed copies of his draft report to the attorneys for Famigletti, to the court and to the judge, and the copies were received by the attorneys on May 14, 1948, and by the court and the judge on May 15, 1948. Rule 28 of the District Courts (1940) provides that the party requesting the report shall file a draft report, and that 'A copy of such draft report shall be delivered or mailed postpaid by the party requesting the report *to the trial Justice and to the adverse party before the close of the next business day after such filing.*' The judge found that the copy of the draft report was mailed to Famigletti before the original draft report was filed in the court. Famigletti moved to dismiss the draft report on the ground that the copy of the draft report was mailed to him before the original was filed. The judge denied the motion to dismiss, and Famigletti claimed a report to the Appellate Division which ordered the following entry: 'Finding for the plaintiff for $300 ordered vacated, finding ordered for the defendant. Finding for the defendant in setoff to stand.' Famigletti appealed to this court.
>
> "Provisions of statutes and rules of court regulating appellate procedure are construed strictly. With regard to exceptions, under a statute similar to Rule 28, *supra*, it is held that the exceptions must be filed first, and notice given afterwards. *Walsh* v. *Feinstein*, 274 Mass. 597. *Saunders* v. *Shoe Lace Co.*, 293 Mass. 265. *LaFond* v. *Registrars of Voters of Gardner*, 296 Mass. 453. *Checkoway* v. *Cashman Brothers Co.*, 305 Mass. 470. Reports in the District Courts are analogous to exceptions in the Superior Court. *Gallagher* v. *Atkins*, 305 Mass. 261. *Wind Innersole & Counter Co. Inc.* v. *Geilich*, 317

Mass. 327, 329. In our opinion the motion to dismiss should have been granted without consideration of the merits.

> Order of Appellate Division reversed.
> Report dismissed."
> (pp. 316-317; Italics added).

On March 30, 1949 *Tanzilli* v. *Casassa* (1949 A.S. 381) was decided. This was a zoning appeal.

> "By G.L. (Ter. Ed.) c. 41, s. 30, as appearing in St. 1933, c. 269, s. 1, the board of appeals is required to cause to be made a detailed record of its proceedings, including the reasons for its decisions, copies of which shall be immediately filed in the office of the city or town clerk. The same section provides as follows: 'Any person aggrieved by a decision of the board of appeals, whether or not previously a party to the proceeding, or any municipal officer or board, may appeal to the superior court sitting in equity for the county in which the land concerned is situated: *provided that such appeal is filed in said court within fifteen days after such decision is recorded.*' In this case the judge found that the board of appeals filed its decision in the office of the city clerk on August 11, 1948. Before that day, on August 9, 1948, the plaintiffs Tanzilli and others filed their appeal in the Superior Court. The defendant Casassa contends that the appeal was premature, because not filed 'after' the decision was recorded.
>
> "It is well settled in similar cases, where a statute required action within a certain time 'after' an event, that the action may be taken before that event. Such statutes have been construed as fixing the latest, but not the earliest, time for the taking of the action. *Atherton* v. *Corliss*, 101 Mass. 40. *Young* v. *The Orpheus*, 119 Mass. 179, 185. *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257, 258. *Bay State Dredging & Contracting Co.* v. *W. H. Ellis & Son Co.*, 235 Mass. 263, 267-268. *Nevins* v. *Board of Public Welfare of Everett*, 301 Mass. 502, 503. *Sherrer* v. *Sherrer*, 320 Mass. 351, 354, and cases cited. Under those authorities, we think that the appeal to the Superior Court was lawfully filed." (p. 382; Italics added).

Notes on Books for Lawyers

(The 6th edition of Crocker, the supplement noted below, Borchard's and Anderson's books on Declaratory Judgments and The Harvard Law Review article, are at the Association's headquarters for members who wish to see them.)

1949 Supplement to the 6th edition of Crocker's Notes on Common Forms

By Roger D. Swaim, (Little, Brown and Company $5.00)

Ever since the first publication of the 6th edition in 1938, the editor, Mr. Swaim, has prepared supplementary notes for the Massachusetts Conveyancers' Association which, by arrangement with that organization, have been printed in the Massachusetts Law Quarterly and in separate leaflets. These notes have now been rearranged, enlarged and added to so as to include cases and laws from 1938 through volume 321 of the Massachusetts Reports and laws enacted in 1948.

To answer a question frequently asked as to how to examine title, an article entitled "The Mechanics of Title Examination" by Richard B. Johnson, Esquire, of the Boston Bar has been added as appendix. This article was originally written for law school students of Professors A. James Casner and W. Barton Leach of the Harvard Law School and, as revised by Mr. Johnson, is printed here with their permission.

Also included in the Appendix is a list of wills construed by the Massachusetts Supreme Judicial Court from Volume 166 up to and including Volume 321 of the Massachusetts Reports. This is a continuation of a list prepared by Prescott F. Hall, Esquire, in 1896, and enables conveyancers and others interested to ascertain whether a will has been the subject of construction by the Court in recent cases.

It seems needless to say that this book will be helpful. As a generation of the bar have grown up during the period since 1929 when real estate transactions became a stagnant field of practice, many of these young men lack the experience in registries of deeds which was familiar to their elder brethren in general

practice. They will find much that they need in Mr. Johnson's article.

F.W.G.

Declaratory Judgments

The Harvard Law Review (March 1949) contains a note of about one hundred pages on developments in this recent and somewhat unfamiliar field of procedure and the practical questions which have emerged from experience since the publication of Prof. Borchard's 2nd edition in 1941. It forms a sort of supplement, therefore, to Borchard's book and may well be examined for the later news.

F.W.G.

"The Law and You"

By Max Radin
A "Pelican Mentor" Book, published by The New American Library of World Literature, Inc., 245 Fifth Avenue, New York City (35c)

In the "Quarterly" for October 1948 (pp. 77-79) we discussed briefly "twistory, mystery and history" in their relation to legal matters. "Twistory" and mystery are more familiar to laymen than legal history.

In this little book—the first book about law in the pocket drug-store edition that has come to our attention—Prof. Radin tries to help laymen to understand law and lawyers better. Many people do not seem to read prefaces so we quote the opening sentences from his preface as follows:

> "This book is not a handbook of law. It is not a manual for law students. It is not a practical guide of that deservedly reprobated pattern called 'Every Man His Own Lawyer'."

He opens his first chapter, "There Is No Mystery to the Law", with the following paragraphs:

> "If it is a matter of law, the ordinary citizen is likely not only to be completely ignorant but to boast of his ignorance. He thinks of the law as something mysterious, irrational, and unnecessary. He has toward it a mixture of fear, resentment, and suspicion which he tries to cover by

an attitude of almost constant derision. A great deal of threadbare wit is expended on the wide gap between law and justice—in which latter field everybody thinks himself a wholly qualified expert—and on the unscrupulousness and chicanery of lawyers.

"The ordinary sources of public information in this instance are not only defective but are for the most part misleading. When newspapers deal with anything that concerns the law, they select those cases that savor of melodrama or pruriency, often representing them inaccurately and as often as not with partisanship even if they are non-political. In fiction, doctors, engineers, or other specialists may be heroes; lawyers, almost never. The cinema knows virtually no lawyer except the successful trickster or the impassioned orator, and in most instances, in spite of the hundreds of occasions in which courtroom scenes are depicted on the screen, no real effort is made to represent any part of legal procedure accurately, except the courtroom furniture.

"The attitude of fear and ignorance, masked by derision, is balanced by an almost pathetic belief that any public deficiency can be remedied by 'passing a law', and an equally naive conviction that, but for the wicked perversity of lawyers, a mysterious something called 'the law' would secure people in their rights and protect their property merely by its own operation."

As it is of considerable importance, and also of probable interest to judges and lawyers, that they should know how the profession and the law are being placed before lay readers, we recommend the book to them. Especially, we call their attention to the following passage, (pp. 188-189). To what extent is it true?

"Lawyers are . . . necessarily historians, although they resent being so called and profess at most a lukewarm interest even in the development of their own institutions. They call concern in such matters 'antiquarianism', something that is entertaining but slightly trivial. Yet they stress the fact that they derive their law from precedent, which is pure history, and they seek to interpret statutes by considerering the conditions under which the statute arose and was framed, which is also pure history.

"The fact that lawyers resent being historians does not prevent them from being so, and it would be better if they took their obligations as historians seriously and considered carefully their legal ideas in the historical setting in which they were developed, and if they examined the historical conditions which gave them their present form. If they do not take this task seriously, they will not cease to be historians. They merely will be bad historians."

F.W.G.

Life of Sir Arthur Conan Doyle

By John Dickson Carr, Harper Brothers, 1949

We found this an absorbing story which should interest lawyers. Most readers will probably be as surprised as we were to learn of the range of activities and influence of the man whom most of us have known simply as the creator of Sherlock Holmes. They probably do not realize that he was not particularly interested in his detective hero although his public demanded the detective to such an extent that he had to revive him after he had killed him. The stories which absorbed him most were his historical novels—"The White Company"; "Sir Nigel"; "The Refugees" and "Rodney Stone", widely read and well worth reading. Before writing these he soaked himself in the history of the times in which they were set.

He was the grandson of John Doyle and the nephew of "Dicky" Doyle—two of the leading caricaturists of the nineteenth century. A doctor in active practice he headed a field hospital at Bloemfontein during the Boer War when men were dying in droves from enteric fever. At the beginning of that war the English standard appeared to be that the honorable practice was to give the enemy a chance to kill you as easily as possible. Doyle saw that it was not good sense to march in solid formation as they did at Bunker Hill against men who could hide behind something and shoot them down. Many lives were lost before they learned from experience. Before the first World War he warned of the danger of submarines, the need of inflatable boats, the need of an air force and the need of tanks. Again they had to learn the "hard way".

The chapter of special interest to lawyers tells the story of the cattle maiming case in which an innocent man was convicted

and had served three years of a seven year sentence when Doyle heard of it and, for about eight months, turned himself into Sherlock Holmes and after digging out the facts pressed the case against the government through the press and Parliament until he secured a full pardon. This case and the Beck and Slater cases of mistaken identity led to the creation of the court of criminal appeal both in England and Scotland, partly as a result of Doyle's influence. A sustained enthusiast, he also had a rare capacity of enjoying life in spite of varied personal problems and struggles. The author, himself a well known writer of detective fiction, has given us a sympathetic and appreciative picture of a great character which is well worth reading.

F.W.G.

The English Legal Assistance Plan—Prepared and Controlled by the Lawyers. By Reginald Heber Smith, Director of the "Survey of the Legal Profession."

(From the A.B.A. Journal for June 1949, Copyrighted. Printed by permission).

Introductory Note

In view of the current fortunately vigorous discussions on the issue of "Socialized Medicine" and the current "twistorical" misunderstandings of legal developments in the "home of the common-law" it is important that the bench and bar of Massachusetts should understand something about the facts. This paper has been submitted to us by Mr. Smith with the following letter:

"Raymond Moley in his column printed December 20, 1948 called the English plan for Legal Aid and Advice, now before Parliament, 'Socialist'.

"Harry J. McClean of Los Angeles, president of the California Bar Association, made a speech in Portland, Oregon, on March 28, 1949, and, referring to the plan, stated:

'The great experiment abroad includes a complete socialization of the law.'

"Philip C. Ebeling, president of the Ohio Bar Association, in a speech at Dayton, May 13, 1949, said:

'Lawyers are genuinely concerned about the trend toward socialization of the profession. . . . The best way to meet this trend is to make it possible for every person, rich or poor, in these United States to have access to the services of a competent lawyer through the organized bar.'

"Both Mr. Moley and Mr. McClean are mistaken and they are by no means alone in their misapprehension of Britain's effort to make legal services available to its poor and to persons of moderate means.

"I wrote the enclosed article to put the facts before the 40,000 members of the American Bar Association.

"If you agree with me that this plan is deeply significant for the United States, you can help by presenting the facts to your readers."

"The plan is for free, or partly free, legal assistance to persons whose gross incomes are under $3,000. The fact is that

both the Conservative Party and the Labor Party have supported the legal aid proposals from their beginning during World War II. The English plan is not revolutionary, and to condemn it as 'socialistic' and utterly alien to American ways is simply to confuse and deceive ourselves.

"The plan, drafted by Thomas G. Lund, Secretary of the Law Society, was approved by the Society and a Parliamentary Committee. It is believed certain to pass when it comes up later this year.

"As long as the Law Society remains strong and independent, the danger of governmental control of the lawyers is practically eliminated.

"American conditions require a somewhat different plan, but the need in the United States is as great as in England and because the demand is moral in character, it must be met in one way or another."

The Incorporated Law Society, referred to in Mr. Smith's paper, is the organization of solicitors (not barristers) in England and Wales, which, we were told a year or two ago by its secretary, Mr. Lund, has about 14,000 members out of a total of about 16,000 solicitors.

So far as Massachusetts is concerned, in reading the article it should be borne in mind that the 46th (commonly known as the "anti-aid") amendment as to the use of public funds for any "institution not under the exclusive control order or superintendence of public officers or public agents authorized by the Commonwealth or federal authority or both", would raise a serious constitutional question as to the possibility of government assistance such as the English plan provides for.

In view, however, of movements which may develop elsewhere in this country in some form or other, we should know the nature of the great English experiment.

F.W.G.

THE ENGLISH LEGAL ASSISTANCE PLAN*

Parliament is about to enact legislation, based on the famous Rushcliffe Report, which will greatly extend legal assistance in court and out of court, not only to the poor but also to persons of moderate means in England, Wales and Scotland.

Headlines in American newspapers have called this "socialized law" and some writers have asserted that it presages socialization of the legal profession.

It seems certain that this great undertaking will have a direct effect upon the development of our own legal institutions so that it is important to understand what the plan really is and also what it is not.

In describing the plan I shall try to stick to the fundamentals and to leave out aspects that are peculiar to the English organization of courts and of the Bar. Also, I shall endeavor to translate the plan from its English terminology into American terms or analogies, because anyone studying the subject quickly finds that it is altogether too easy to draw false inferences and to become completely misled. For example, the basic phrase "legal aid" means one thing in England and something quite different in the United States. And what lawyers in America receive for their services we call "fees"; in England what the solicitor receives for services is part of his "costs". Whenever the context requires the use of words whose meaning to us differs from their meaning in England, I will insert a definition.

Those who wish the complete details will find them in most convenient form in "Lecture on the Legal Aid and Advice Scheme" delivered before approximately 1000 London solicitors by Thomas G. Lund, Secretary of the Law Society, on December 8, 1948,

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**Editor's Note:* This article is a report prepared for the Survey of the Legal Profession.

The Survey is securing much of its material by asking competent persons to write reports in connection with various parts and aspects of the whole study.

As reports in some fields of the Survey will require two years or more, the Survey Council has decided not to withhold all reports until the very last has been received but to release reports *seriatim* for publication in legal periodicals, law reviews, magazines and other media.

Thus the information contained in Survey reports will be given more promptly to the Bar and to the public. Such publication will also afford opportunity for criticisms, corrections and suggestions.

When this Survey has been completed, the Council plans to issue a final comprehensive report containing its findings, conclusions and recommendations.

which fortunately has been reprinted in the March, 1949, issue of *The Record* of The Association of the Bar of the City of New York (Volume 4, Number 3, page 77). "The Legal Aid and Advice Bill [Bill 22]" and "Summary of the Proposed New Service" have been printed by His Majesty's Stationery Office in London and the latter has been reprinted in the December, 1948, issue of *Brief Case* (Volume VI, Number 10, page 82) published by National Association of Legal Aid Organizations. My own study of these documents left me with a number of practical questions unresolved and so I have had a considerable correspondence with Mr. Lund to whom I wish to acknowledge my great indebtedness.

1. Origin of the Plan.

Everything that follows will be seen in much truer perspective if we keep firmly in mind the real origins of the plan.

Because the present government of England is a Labour Government which has socialized the railroads, coal mines and other basic industries, it has been assumed in the United States that the Legal Aid and Advice Scheme is another step and a vital step by the Labour Government towards complete socialism.

The facts are quite the contrary. As S. C. T. Littlewood, Chairman of the Legal Aid Committee of the Council of the Law Society and a member of the Rushcliffe Committee, has stated:

> That Scheme in the first place was prepared entirely by Mr. Lund. It was his own idea and he did it unaided. The Committee of the Council of course went through it. The Rushcliffe Committee . . . adopted almost completely the Scheme put forward by the Law Society.

If, in America, the executive secretary of a state bar association drafted such a plan, had it approved by the Association's Legal Aid Committee and then by the Association which in turn submitted it to a committee of its state legislature, we would not talk of "socialization" at all. We should simply think that an alert bar association was trying to do its full duty.

2. Cause of the Plan.

The impelling force behind the plan was that, for reasons which have never been clear to us, legal aid in England had lagged far behind its development in the United States. This statement is fully supported by Robert Egerton, the head of the largest Free Legal Advice Centre in London, in his book *Legal Aid*, published in 1947.

The situation was so bad that Gurney Champion proposed in his *Justice and the Poor in England* that Parliament repeal the fortieth paragraph of Magna Charta—"to no man will we deny, sell or delay right or justice".

World War II brought matters to a crisis. Professor A. L. Goodhart of Oxford has stated:

> It was the Army which first realized that it was necessary to furnish free legal advice to the soldiers if their morale was not to be affected; it has taken this war to bring the lesson home to those in authority.

In a literal sense German bombs made a powerful contribution. Before the war, the largest Legal Advice Centre in London was open only one evening a week. Advice was given and that was all. The solicitors received no compensation; they rendered this public service after a full day's work in their own offices. There were no stenographers; hence no letters were written. There were no negotiations with opposing parties; and so disputes that could have been adjusted were not settled.

"At the outbreak of war, when all evening activities stopped," points out the Rushcliffe Report, "the centre tried the experiment of opening for a short period during the day, and from this has sprung the interesting development of a whole-time Poor Man's Lawyer centre staffed mainly by full-time solicitors who receive small salaries and where whole-time typing and clerical assistants are also employed. This has facilitated an increase in letter-writing and has made it possible for the centre to do much more by way of negotiation."

The dates of the Rushcliffe Report themselves reflect the determination with which England, once aroused, faced its legal aid problem. The Committee was appointed in May, 1944, at the time of the Normandy invasion; it filed its report in Parliament in May, 1945, when Germany was capitulating.

It may also be noted that the election which brought the Labour Government into power was held on July 5, 1945. The Conservative Party as well as the Labour Party has supported the legal aid proposals.

These things are not said in order to detract anything from the credit to which the Labour Government is fully entitled. During this period of austerity it has had the courage to stand by

the Rushcliffe Report which may place a burden of eight million dollars a year on the British Treasury.

I have recited these facts so that when we consider the significance of the English plan for our own institutions we shall not fight a sham battle about ideologies but will examine the English plan with the full and unbiased respect to which it is entitled on its merits.

3. Principles Underlying the English Plan.

The English plan rests on five basic principles.

1. No person ought to be deprived of legal advice or, if necessary, legal representation before any court in the country by reason only of lack of means.

This principle comes from Magna Charta. It has been embodied in American law. It is approved by our bar associations. Very similar words will be found in the constitutions of our Legal Aid Societies.

2. Those who can afford to pay nothing should receive their legal aid free, but those who can afford to contribute something towards their own costs should contribute what they can afford.

The first half of this sentence accords with American ideas about legal aid. The second half of the sentence is common sense; in the United States we are just beginning to deal with the problem of those who can pay something by our experiments with lawyer reference plans and bar association discussions about "low-cost legal service bureaus".

3. The legal services to be provided should be provided by the legal profession, who should receive fair and reasonable remuneration for their services.

There can be no quarrel with that statement. It is not a platitude because it states a principle which, if adhered to, will stop the muddy-minded thinking which has caused endless trouble in the proper development of legal aid work.

It *is* a lawyer's professional obligation to serve needy clients free of charge as much as he can. But it is *impossible* for a lawyer to serve too many clients without charge because he will go bankrupt.

4. The administration of the Scheme should not be by a Department of State or a local authority but should be by the

profession itself, acting through the Law Society and responsible to the Lord Chancellor as head of the legal profession.

This is a doctrine we profoundly believe in. As the philosophy of legal aid has developed in the United States, it has steadily become clearer that the responsibility for the conduct of legal aid is a professional responsibility of the Bar and that it can best be performed by the organized Bar. That is why the American Bar Association has now, and for nearly a generation has maintained, a Standing Committee on Legal Aid Work.

5. In so far as it is not found from other sources, the cost should be borne by the State.

Here the English plan is being logical. If the cost of adhering to Principle No. 3 exceeds the receipts that can be expected under Principle No. 2, then the difference must be defrayed by public funds.

But at this point some readers may say to themselves: "At last the cat is out of the bag. This is socialization!"

Since that word has acquired connotations and overtones in the United States which arouse strong emotional reactions let us deal with it at once.

4. Does the English Plan Involve Socialization?

The verb "socialize" unhappily is an ambiguous word. Webster's Dictionary uses as definitions "to adapt to social needs or uses" (which most honest citizens approve of) and "to render socialistic; to regulate by the theories or practices of socialism" (which most of the same people violently disapprove of).

I believe the picture which "socialization of the profession" brings into the minds of American lawyers is substantially as follows. The Government opens a bureau or a chain of bureaus. The staffs of the bureaus consist of lawyers on salary. The lawyers are political appointees. Persons needing legal aid go to the offices of the bureaus. Gradually the rules as to eligibility for free assistance are expanded, for political reasons, until finally the private practitioner is crowded to the wall.

Undeniably this raises a serious question. And truth compels the admission that the analogies that come readily to mind are mostly misleading. To subsidize the medical profession may or may not be a wise thing; but to subsidize the legal profession involves something entirely different. The enemy of the doctor's patient is disease, but the enemy of the lawyer's client may be the

government itself. This is so because government can become the worst tyrant of all and also because, as governmental services are expanded, the citizen has more disputes with government. The true analogy would exist if the doctor's subsidies came from the microbes.

The fear is that if the Government becomes paymaster of the lawyers it will soon become master of the lawyers.

The real question, under the English plan, is whether the interposition of a strong, independent agency between the Government and the lawyer eliminates the danger, for practical purposes.

The solicitor does not work in a government office; he remains in his own office. He need not seek appointment by a governmental official; he can volunteer for service or not. He is not paid a salary; he receives his fees (called "costs") in accordance with law. He is amenable to discipline not by government but by the Law Society. His obligation to a client under the plan is exactly the same as to any client in his private practice.

This plan should prove sound because the Law Society is strong and independent. It is master in its own house having control over admissions and over discipline. It is all-inclusive. The complete independence of both branches of the legal profession in England is supported by long tradition which contrasts sharply with the comparative weakness of most of the bar associations in the United States. An analysis of the historical causes for this divergence would lead us too far astray; but it should be noted that the recent development of all-inclusive, state-wide bar associations puts us back on the main road and offers great promise.

In the United States our institutions for giving legal assistance to the poor have, in the main, grown up as private philanthrophies, sponsored by lawyers or by bar associations.

Yet, at the same time, there are many instances where public funds have been relied on and, so far as I am aware, no one has claimed that legal aid, by receiving public financial assistance, had become socialistic.

All public defenders are paid out of public treasuries. The Legal Aid Society of Rhode Island receives an annual appropriation from the state legislature. The Buffalo Legal Aid Society receives substantial aid from the city and county. Several legal aid offices are given rent-free space in public buildings.

Under the laws of Connecticut there is a public defender in

every county who is paid out of the county treasury. The larger cities are authorized to establish legal aid bureaus at municipal expense, which New Haven, Hartford and Bridgeport have done.

The nearest analogy to the English plan to be found in our country is a statute in the State of Washington under which the legislature may appropriate public funds to the Washington State Bar to be disbursed by it for legal aid work. This has never been put into effect.

These illustrations indicate that the English plan is not revolutionary and that to condemn it as "socialistic" and utterly alien to American ways is simply to confuse and deceive ourselves.

The two features that make the English plan have especial significance for us are these:

First, it is a nationwide plan designed to give complete coverage.

Second, it is the first great effort to extend the principles of legal aid to persons who are not "poor," but who are persons of moderate means able to pay something for legal services.

5. Broad Outline of the Plan.

The English plan is aimed primarily at providing assistance in *civil* cases.

For some time England has enjoyed a good public defender system supported by the public treasury. It is not generally realized in this country that the traitor "Lord Haw-Haw", being penniless, was represented and stoutly protected in all his legal rights, from arraignment through trial and the final appeal in the House of Lords, by solicitors and barristers paid out of public funds under the English Poor Prisoners Defense Act of 1930; in other words by lawyers who, in America, are called public defenders.

England has had a poor persons' procedure (roughly analogous to our *in forma pauperis* procedure), but it was limited to cases in the Supreme Court and the test of poverty became too strict. It made no provision for general legal advice and consultation which is by far the larger part of the need for legal services which most people have throughout their lives.

The new plan extends legal aid to persons having cases in *all* courts in the country. This does not include administrative tribunals at the present time.

The extension of this plan to the county courts is of the greatest importance because most of the cases of the average citizen are heard there and, further, because solicitors are entitled to try cases in the county courts.

The English plan falls into two major parts which will be confusing to American lawyers unless we fix the English terminology firmly in mind.

With us "legal aid" means assistance to *poor* persons in court or out of court and of course includes advice. In England "legal aid" means *assistance in litigation and negotiation but not advice* and it includes assistance not merely to the poor but also to persons of moderate means.

The giving of advice is called in the English plan simply "Advice". It does not include letter-writing or any negotiating with opposing parties or counsel. In England the office giving advice has commonly been called "Poor Man's Lawyer".

As "legal aid" in the English statutes excludes all advice but includes negotiation, settlements, letter-writing, all preliminary steps in litigation and the litigation itself, I will use the term "legal assistance".

In contradistinction to "legal assistance," the word "advice" will refer purely to oral advice on legal matters and to no other part of the lawyer's usual work for clients.

(Parenthetically it must be noted that drawing wills, conveyances of property and probate work are not provided for under the English plan. The theory is that such cases involve property so that the clients need no special assistance.)

To qualify for legal assistance (as thus defined) the applicant must have an income and a capital less than limits fixed by the statute; in other words, the applicant must pass a "means test".

To qualify for advice (as defined) the applicant need pass no "means test". Whether the solicitor should serve him gratuitously or not is left to the sound discretion of the solicitor himself.

6. Legal Assistance: The Means Test: Its Administration.

In any plan of this sort the "means test" is always bound to be the most awkward feature. The legal aid societies in the United States have steadily had great difficulty defining *in words* just who is a "poor" person and who is just above being "poor" in economic status. In actual practice the problem virtually disappears; but in drafting a statute some definitions and classifications are inescapable.

This is the one part of the plan which the Law Society refused to administer. It believed that it would be "damned if we do and damned if we don't". If strict in interpretation, the public might feel it was emasculating the plan; if liberal, the public might charge that the lawyers were trying to drag in all the business they could get.

Hence the means test will be administered by the National Assistance Board. The nearest analogies in the United States would be the Social Security Board or the state unemployment compensation commissions.

7. Legal Assistance: The Means Test: Its Coverage.

It is extraordinarily difficult for us to translate the terms of the English statute into words and phrases that are perfectly clear to us. The critical term is "disposable income". Very roughly that means net income after taxes, after a few specific deductions, and after certain family deductions. We are not quickly familiar with English tax rates but the fact is that they have far more effect on arriving at "disposable income" than we have been led to realize by much of what has been published in our country.

For our purposes I believe that a few specific figures will give as complete a picture as we need. I will convert pounds into dollars at the simple ratio of 1 pound = $4.00.

Persons may be eligible for the benefits of the plan if their *gross* income does not exceed about $3,000 per annum.

But persons are ineligible if their *disposable income* exceeds $1,680.

It is estimated that of England's total population of 48,000,000 the benefits of the plan will be open to the members of 12,000,000 families. This one-quarter to one-half of the population certainly includes all the poor and with equal certainty it does not include all the middle class. It probably includes the lower one-half of the middle class or what in the United States we often refer to as "persons of moderate means".

I have tried to convert the English over-all figures into what their approximate equivalents would be in the United States. Figures supplied by the Federal Reserve Board and the Department of Commerce indicate that in 1946 there were at least 40,000,000 men, women and children in "spending units" with gross income of from $1,000 to $1,999. Under a family income of $2,000 is

just about the line drawn by our legal aid societies in our large cities in determining who is entitled to gratuitous legal aid.

In the class with incomes from $2,000 to $2,999 there were about 35,000,000 people.

Statistical exactness is unimportant. It is self-evident that the English plan is an ambitious one and reflects a genuine desire to give assistance either gratis or at low cost to all who may need it.

8. Legal Assistance: Contributions by Those Served.

Those served by the plan are no longer to be called "poor"; instead they are known as "assisted persons".

The contribution which such a person may be called on to make is best understood by a concrete illustration.

Let us assume a married man with a disposable income of $1,232. This means his income *after* taxes and, in certain cases, after deducting rents, disability pensions and an allowance in respect of each child, if any. He is entitled to a further deduction of $208 for his wife. That gives us a "final disposable income" of $1,024.

A person with a final disposable income of $624 or less pays nothing.

An assisted person is liable to pay 50 per cent of the excess of his final disposable income over $624.

In the case we started with, the excess is $400 ($1,024 minus $624); 50 per cent of that is $200. In addition, contributions will be made out of capital, if any. The expression "capital", however, does not include household furniture, tools of trade, or an occupied house; nor does it include the subject matter of the litigation. Assisted persons may be required to contribute all capital (as thus defined) in excess of $300 if single, or $600 if married.

I will not cumber this article with elaborate computations as to contributions from capital assets. If the English experience proves to be roughly comparable to our legal aid experience in the United States, it will turn out that figures as to income will be controlling nine times out of ten.

It is obvious that the contributions by persons served, while they will never be large, can amount to much more than token payments.

9. Legal Assistance: Remuneration to Lawyers.

The English plan for remuneration to lawyers is based on a

factual situation and a principle neither of which obtains in the United States.

Solicitors' "fees" ("costs" in England) are fixed by law—apparently by multitudinous statutes. Barristers' "fees" are not prescribed by statute, but as against a losing party in litigation the amount to be paid towards the winner's barrister's "fee" is fixed in each case by a court official called the Taxing Master. That factual situation does not exist with us.

The principle in the English administration of justice is that the losing party shall reimburse the winning party for all his reasonable and normal costs including the "fees" of his solicitor and barrister. With us the principle of general application is that each litigant pays his own attorney out of his own pocket.

As "fees" are thus fixed in England, the Rushcliffe plan at this point has easy going.

It provides that in cases in the Supreme Court barristers and solicitors shall receive 85 per cent of the normal or standard "fees".

For cases in the county courts the solicitors will receive full fees.

At this point we can define more precisely what the contribution by the Government will be.

We have already seen that the assisted person may himself be liable to pay a not unsubstantial sum depending on his means. We have pointed out that the loser must pay the winning party for all his expenses. The solicitor will be paid from these sources before the Government is called upon at all.

But if those two sources prove inadequate, then the Government must make up the shortage.

What the cost to the Government will actually be can be known only after experience. The Government's own estimate is $8,000,000 per year but it says this figure is "necessarily conjectural".

A great deal will depend upon how the responsible committees of lawyers determine whether the applicant has reasonable grounds for bringing or defending an action.

The experience of legal aid offices in the United States has been that as to cases which they could not settle and decided to bring to trial, they have won in an overwhelming majority of instances.

Apart from "fees" in litigation, the Government will pay so-

licitors and barristers for their administrative work on area and local committees.

10. Legal Assistance: Reasonable Grounds for Suing.

The applicant for aid must not only satisfy a "means test" which, as we have seen, is not administered by the profession; he must also show reasonable grounds for believing that he has a legal case or a legal defense. At this point, the legal profession takes hold and becomes responsible.

The profession will administer the plan through twelve area committees. Each area committee will consist of four barristers and twelve solicitors.

Each area committee will appoint local committees. A local committee will consist of five solicitors (with three constituting a quorum). Barristers may serve on local committees.

The local committee decides whether the applicant's case or defense is sufficiently meritorious to give him a "Civil Aid Certificate" which entitles him to the benefits of the plan.

In granting or denying applications the local committee has a substantial margin of discretion. It is not compelled to grant the application even if there seems to be a legal case; the committee can decide that it is not a case that is entitled to be litigated at public expense.

It is at this point in the procedure where the "headaches" occur. This is inevitable and no plan has ever devised any foolproof procedure or any series of infallible tests. The saving grace is that in actual operation the decisions to be made case by case are much clearer than in theory would seem possible. With experience the lawyer-administrator acquires a "feel" of the matter so that his judgment is almost intuitive.

An aggrieved applicant can appeal from the local committee to the area committee.

11. Advice.

Advice, as it has been narrowly defined, is to be given in offices called Legal Advice Centres. They will be located and set up as determined by the area committees.

In the offices will be solicitors on a full-time or part-time basis (depending on the volume of work). They will be employed and paid salaries by the Law Society.

Advice will be given orally. The offices will be open mornings and afternoons and, if necessary, in the evenings.

Persons seeking advice will not be subject to any "means test". Each person will be expected to pay 50 cents for each interview but the solicitor may waive that.

If the lawyer at the Legal Advice Centre believes the applicant can afford to consult a solicitor in the usual way, he will give him no advice except just that.

12. The Client-Lawyer Relationship.

English barristers and solicitors will not be regimented and dragooned to serve on panels under the plan. They are free to enroll or stay out.

If they enroll, they are expected to accept cases "as they come". This is also the rule under lawyer reference plans in the United States. While they cannot "pick and choose," they can be excused for valid reason and a valid reason can be overwork.

The client, who has qualified, can select any solicitor on the panel.

To quote Mr. Lund:

> It is certainly intended to interfere as little as is really possible with the normal relations which exist between client, solicitor and counsel.

13. Financial Provisions.

Each year the Lord Chancellor will make a grant of a lump sum to the Law Society which will be kept separately as the Legal Aid Fund.

Into the fund will go all contributions of assisted persons, all "costs" received in behalf of assisted persons, and the nominal fees paid for advice.

As everything must go into this fund, barristers and solicitors will be paid what they are entitled to receive out of this fund by the Law Society.

14. The Lord Chancellor and His Advisory Committee.

In supreme charge of the plan is the Lord Chancellor who is the executive head of the whole administration of justice in England and who appoints all judges.

We have no comparable officer in the United States. The nearest analogy is probably that of the Chief Justice of the Supreme Court of New Jersey under its new constitution. He is the executive head of all courts but does not appoint judges.

There will be an Advisory Committee, to be appointed by the Lord Chancellor, and it is expected that a majority of its members

will be laymen. Apparently their primary function is to keep an eye out to see that those who need legal aid really get it.

15. Summary.

The foregoing does not purport to be a complete resumé of the English plan. It leaves out of account, for example, special provisions as to divorce cases which are so numerous that some will have to be handled by specialists on a "mass-production" basis. Also I have omitted references to assistance to troops on overseas duty and to certain extensions of the existing provisions for assistance in criminal cases.

As the Act itself is twenty-one pages in length and the official summary covers eleven pages, it has seemed to me that the space at my disposal would best be devoted to the salient features of the English plan and especially to those aspects which have relevance to the similar problems we are facing in our own country.

It is obvious that the plan could not be transported bodily to the United States. We will be wise to do as the English have done and build on the foundations of what has already proved good in our own legal institutions including our legal aid organizations.

The need in the United States is as great as in England and because the demand is moral in character, it must be met in one way or another. It is earnestly to be hoped that our bar associations will accept the challenge and, emulating the Law Society, work out a plan that they believe will accord with the public welfare.

Judge Albert Conway, of the New York Court of Appeals, in his address at the annual meeting of the New York State Bar Association on January 25, 1947, spoke of the "hundred million or more" people in our country who do not find any simple or easy access to lawyers' services. Then, turning his attention to the English plan, which we have been considering, he said:

> Sometimes we see things more clearly by lifting our eyes from our surroundings and viewing what is occurring elsewhere. In England a committee consisting of leaders of the bar and in social reform headed by Lord Rushcliffe was appointed in London on May 25, 1944, curiously enough when the war was at its height, "to inquire what facilities at present exist in England and Wales for giving legal advice and assistance to Poor Persons, and to make such recommendations as appear to be desirable for the purpose of securing that Poor Persons

> in need of legal advice may have such facilities at their disposal . . . ." In May of 1945, one year later, there was made the so-called Rushcliffe Report, by the Committee, to the Lord High Chancellor and by him presented to Parliament. I recommended most earnestly a reading of it and of the recommendations contained therein.

One major section of the Survey of the Legal Profession, now under way, is devoted to availability of lawyers' services. The Survey will study legal aid, public defenders, lawyer reference plans, the Philadelphia Neighborhood Law Office Plan, legal service offices for persons of moderate means and all related subjects.

It is to be hoped that the Survey reports will give the bar associations reliable factual material which will enable them to act in order to insure a more equal administration of justice in America.